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No. 86-6867

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

LESLIE LOWENFIELD,
Petitioner,

VERSUS

C. PAUL PHELPS,
Secretary of the Department of Corrections
State of Louisiana, *et al.*,
Respondents.

On Writ of Certiorari to the United States Courts of Appeals for the Fifth Circuit

---

BRIEF FOR THE RESPONDENT

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THE QUESTIONS PRESENTED

(1) Did the sentencing hearing violate the petitioner's right to a fair trial and due process under the Sixth, Eighth and Fourteenth Amendments to the United States Constitution, where the trial court repeated his initial instruction on reexamining one's views in the course of jury deliberation and twice polled the jury on the value of further deliberations in response to the jury's notes?

(2) Did the Louisiana's capital sentencing statute, as applied to petitioner, violate the Eighth and Fourteenth Amendments of the United States Constitution where the imposition of the death sentence was based on a single aggravating circumstance which was also an element of the underlying crime of First Degree Murder, La. R.S. 14:30, of which petitioner was convicted?

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STATEMENT OF THE CASE

Petitioner was charged by grand jury indictment with five counts of first degree murder, violations of La. R.S. 14:30(3). On May 8 - 15, 1984, petitioner was tried by a twelve person jury which found him guilty of three (3) counts of first degree murder[1] and two (2) counts of manslaughter[2]. On May 15 - 16, 1984, petitioner's sentencing phase was tried before the same twelve person jury and it recommended the death penalty for each of the three first degree murder convictions. Now petitioner is before this Honorable Court for a review of the sentencing phase of his bifurcated trial as to its fairness and due process.

---

1 Sheila Thomas, Petitioner's former live-in girlfriend; Carl Osborne, the father of Ms. Thomas's child; Myrtle Griffen, Ms. Thomas's mother.

2 Shantell Osborne, Ms. Thomas's child; Owen Griffen, Ms. Thomas's stepfather.

The guilt phase of the trial ended at 11:30 a.m., on May 14, 1984, when the trial court read the charges to the jury. At 11:45 a.m., the jury retired to deliberate. During the afternoon the jury asked the court three questions and requested some evidence. At 7:45 p.m. the jurors requested that they have dinner and retire for the evening. (Joint Appendix, 14-15). (Joint Appendix hereafter referred to as J.A.).

Deliberation began the next morning, May 15, 1984, at 10:05 a.m. Again, throughout the day the jurors requested evidence, and asked a question. After deliberating about 13 hours on five counts of first degree murder, the jury returned to the courtroom at 4:20 p.m. with the five guilty verdicts. (J.A. 9, 25).

After a short recess the defense moved that the sentencing phase of the trial on the 3 first degree murder convictions be delayed by 24 to 48 hours. The state objected to this delay. The trial court checked with the jurors regarding their mental and physical conditions and decided to deny the defense motion since the jurors unanimously indicated they had no need for time to rest. (J.A. 28). Over the defense's objection the sentencing phase commenced at 6:05 p.m. that same day.

After presentation of evidence and closing arguments by counsel at the penalty phase, the judge again instructed the jury (J.A. 43-47):

1. On finding an aggravating circumstance beyond a reasonable doubt (J.A. 44);

2. On considering mitigating evidence (J.A. 44-45);

3. On the charge as not being the opinion of the Court (J.A. 45-46);

4. On the imposition of a life sentence if the jury is unable to agree on a recommendation (J.A. 46);

5. On the reconsideration of one's views (J.A. 46).

Then the jury retired to deliberate at 8:17 p.m. (J.A. 7). At 11:27 p.m., the jury returned with two questions: (1) a clarification of "recommends" and (2) whether or not an automatic life sentence is imposed if a unanimous verdict cannot be reached. After the judge responded in open court the jury returned for more deliberations but requested to retire for

the evening at 11:55 p.m. They had been deliberating for 3 hours and 38 minutes on the penalty for each of the first degree murder convictions.

On May 16, 1984, the jurors returned to deliberate at 9:40 a.m. Two hours and five minutes later defense counsel made an oral motion for a mistrial based on the length of time that the jury had been deliberating as to the penalty (by this time the jury had been deliberating a total of five hours and 43 minutes on the penalties), and on the residual effect of the trial court's final instructions at the guilt phase. (J.A. 24, 51).

At 3:00 p.m., the defense made a second motion for a mistrial based on the length of the deliberations, (eight hours and 43 minutes) Id., and immediately thereafter another motion based on the note that had been received from the

jury[3]. The trial court delayed a ruling on the defense motions until he responded to the jury's request. Before the jurors returned to the courtroom the prosecutor reminded the court of the stipulation that had been agreed on in chambers in regard to inquiring whether or not the jury was deadlocked. The judge was to read the last sentence of the penalty phase instructions, then ask the jury if they had reached a verdict on any counts and, if not, whether further deliberations would be beneficial. Each juror was to have a piece of paper on which to write their response concerning the advisability of further deliberations. (J.A. 52).

3

Judge Cannella 3-16-84 3:00 PM

The jury is having great distress and is unable to reach a decisio.. at this point. There is a great unbalance in the voting. Please call us back in and direct the jury again as to it's responsibilities and the oath we took.

Anthony S. Conzoner:

The trial court denied the defense's first motion and called in the jury. (J.A. 53). In response to the trial court's question the foreman said that the jury had not reached a verdict on any of the three counts. Id. The judge then repeated the law that a sentence of life imprisonment would be imposed if a unanimous recommendation could not be reached. (J.A. 54). Each juror was given a piece of paper on which he was to write his name and "yes" or "no" to answer the question:

> ". . . if further deliberations would be helpful in obtaining a verdict."

The jury then left the courtroom and the count was made: four jurors responded "no" and eight responded "yes". Id. Thereafter the trial court denied defense's motion for a mistrial. (J.A. 55).

Shortly, the jury sent another note stating that some jurors had misunderstood the question. (J.A. 17,55). The jury returned at 3:25 p.m. for the trial court to rephrase the question:

> "Do you feel further deliberations will enable you to arrive at a verdict?" (J.A. 55).

After following the same procedures as before the jury was again instructed on the imposition of a life sentence if it failed to agree unanimously on a verdict as well as given the charge regarding reconsideration of one's views. See J. A. 56.

The jurors were removed from the courtroom and their responses tallied: eleven "yes" and one "no". (J.A. 18).

Fifty-five minutes later, at 4:20 p.m., the jurors were returned to the

courtroom based on their note indicating they had reached a verdict. (J.A. 18). By this time the jury had deliberated about ten hours on the sentences for three counts of first degree murder. After the three sentences of death and their supporting aggravating circumstances were read in open court the jury was polled in writing. (J.A. 58). Thereafter the jurors were dismissed. (J.A. 59).

SUMMARY OF ARGUMENT

The two incidents of jury instructions, or modified "Allen charges" do not violate the constitutional standards of the Sixth, Eighth and Fourteenth Amendments since the modified "Allen charge" did not mention minority or majority views, the charges reminded the jury of the consequences of a

deadlock, the charges cautioned against relinquishing an honest view to reach a verdict, and were given at the request of the jurors who never claimed to be deadlocked. The jury inquiry was also not unconstitutional since it sought guidance on the benefits of further deliberations and the results were not made known to the jurors so as to coerce them.

Despite the result herein that the single aggravating circumstance upon which the death penalty was based repeats an element of the crime, the Louisiana Capital Sentencing Hearing provides limits that individualize and particularize the hearing to the defendant and the offense. Furthermore, the sentence of death is automatically reviewed by the Louisiana Supreme Court to determine if the sentence was imposed

as the result of passion, prejudice or other arbitrary factors. This bifurcated capital scheme reflects the constitutional standards established by this Court since Furman v. Georgia, 408 U.S. 238 (1972).

ARGUMENT

I.

The Sentencing Hearing Was Not Unfair And Did Not Coerce A Death Verdict In Violation Of Due Process And The Eighth And Sixth Amendments.

Petitioner bases his argument herein on the alleged "Allen charge" twice given by the trial court, one of which was the alleged "dynamite charge" given shortly before a verdict was rendered, the polling of the jury and the length of the jury deliberation. He claims that since Louisiana' statute, La.C.Cr.P. art. 905.8 (West 1986), mandates imposition of life

imprisonment when a jury fails to reach a unanimous verdict at the penalty phase, there was no justification for the conduct of the sentencing hearing. As a result of the alleged coercive conduct the petitioner claims that he was denied a fair and impartial trial under the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

A. Constitutional Standards Regarding Jury Charges And "Allen Charges"

This Honorable Court first recognized the appropriateness of instructing a jury that each juror should consider the views of the other jurors, if they differ, with the expectation that there may be a reasonable doubt in the correctness of their own judgment in Allen v. United States, 164 U.S. 492

(1896). This Court found no error in these instructions as summarized therein:

> "These instructions were quite lengthy, and were, in substance, that in a large proportion of cases absolute certainty could not be expected; that, although the verdict must be the verdict of each individual juror, and not a mere acquiescence in the conclusion of his fellows, yet they should examine the question submitted with candor, and with a proper regard and deference to the opinions of each other; that it was their duty to decide the case if they could conscientiously do so; that they should listen, with a disposition to be convinced, to each other's arguments; that, if much the larger number were for conviction, a dissenting juror should consider whether his doubt was a reasonable one which made no impression upon the minds of so many men, equally honest, equally intelligent with himself. If, upon the other hand, the majority were for acquittal, the minority ought to ask themselves whether they might not reasonably doubt the correctness of a judgment which was not concurred in by the majority. These instructions

> were taken literally from a charge in a criminal case which was approved of by the Supreme Court of Massachusetts in Com. v. Tuey, 8 Cush. 1, and by the Supreme Court of Connecticut in State v. Smith, 49 Conn. 376, 386.

Allen v. United States, at 501.

In declaring no error this Court said that it cannot be that each juror should go into the jury room with a blind determination that the verdict shall represent his opinion of the case at that moment or that he should close his ears to the arguments of other men. Id. Now known as the "Allen charge", this instruction has never been declared per se error by this Honorable Court.

In a Per Curiam opinion, Jenkins v. United States, 380 U.S. 445 (1965), this Court did hold that the judge's statement to the jury after 2 hours of deliberation and a note that declared it was unable to

agree upon a verdict "on both counts because of insufficient evidence" was reversible error. The judge stated, "You have got to reach a decision in this case." The Court concluded that "in its context and under all the circumstances the judge's statement had the coercive effect attributed to it". Jenkins, supra at 446. Since there was not an "Allen charge" in Jenkins and the judge in the instant case did not make any such blatant statement, Jenkins offers no resolution or guidance in the case at bar.

Thirteen years later the Supreme Court again addressed the effect of an "Allen charge" in United States v. United States Gypsum Co., 438 U.S. 422, 57 L.Ed.2d 854, 98 S.Ct. 2864 (1978), an antitrust suit. Prior to the commencement of deliberations, the judge

in Gypsum had included in his charge the statement "to deliberate with a view toward reaching an agreement if you can, without violence, to individual judgment". After five days of tense deliberation the judge gave the jury a modified "Allen charge" in the course of answering other questions. He repeated the charge on the sixth day in response to a jury note that it was unable to reach a verdict. On the seventh day the jury foreman requested a meeting with the judge. The judge met alone, with the acquiescence of counsel, with the foreman to assess the state of affairs of the jury. The transcript of the meeting revealed that the jury was deadlocked and that the judge gave a strong impression that he wanted a verdict one way or the other. These communications were not included in the judge's report to

counsel. The opinion stated that the ex parte meeting between the judge and jury foreman was improper and alone warranted reversal. Without making a reference to the modified "Allen charges", the court stated its bases for reversal:

> "Thus, it is not simply the action of the judge in having the private meeting with the jury foreman, standing alone--undesirable as that procedure is--which constitutes the error, rather, it is the fact that the ex parte discussion was inadvertently allowed to drift into what amounted to a supplemental instruction to the foreman relating to the jury's obligation to return a verdict, coupled with the fact that counsel were denied any chance to correct whatever mistaken impression the foreman might have taken from this conversation, that we find most troubling.

Again, this was a situation that involved facts other than an "Allen charge" which constituted the reversible

error. In fact, again, it was the judge's strong suggestion to reach a verdict regardless that caused error. Unlike in Gypsum, supra, the judge in the case at bar informed the jury when he repeated the charge that a life sentence would be imposed if it could not agree to a verdict. The factual difference of Gypsum makes it inapplicable to the case at bar.

This Honorable Court has set guidelines for determining if a jury instruction is reversible error under due process. In Henderson v Kibbe, 431 U.S. 145, 52 L.Ed.2d 203, 97 S.Ct. 1730 (1977): this Court stated:

> "The burden of demonstrating that an erroneous instruction was so prejudicial that it will support a collateral attack on the constitutional validity of a state court's judgment is even greater than the showing

> required to establish plain error on direct appeal. The question in such a collateral proceeding is "whether the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process," Cupp v. Naughten, 414 U.S., at 147, 38 L.Ed.2d 368, 94 S.Ct. 396, not merely whether "the instruction is undesirable, erroneous, or even 'universally condemned,'" id., at 146, 38 L.Ed.2d 368, 94 S.Ct. 396.

Henderson v. Kibbe, at 154.

In reviewing the jury instruction at the penalty phase of a capital murder trial in California v. Brown, 107 S.Ct. 837, 839 (1987), this Supreme Court repeated the two prerequisites to a valid death sentence under the Eighth Amendment:

1. Sentencers may not be given unbridled discretion in determining the fates of the accused. The statute must be structured to prevent an

arbitrary and unpredictable administration, Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976); Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972);

2. The capital defendant must be allowed to introduce any relevant mitigating evidence regarding his "character or record and any of the circumstances of the offense." Eddings v. Oklahoma, 455 U.S. 104, 455, 102 S.Ct. 869, 874, 71 L.Ed.2d 1 (1982).

Hence, when looking at a jury instruction as an Eighth Amendment violation, it must be reviewed as to its violation of one of the above standards. This Court further stated that the review

must focus on what a reasonable juror could have understood the charge as meaning. California v. Brown, 107 S.Ct. at 839; Francis v. Franklin, 471 U.S. 307, 315-316, 105 S.Ct. 1965, 1971-1972, 85 L.Ed.2d 344 (1985). That inquiry requires a focus initially on the specific language challenged. California v. Brown, 107 S.Ct. at 839. If the specific instruction fails constitutional muster, it then must be reviewed as a whole to see if the entire charge delivered a correct interpretation of the law. Id.

It is the State's position that in this case a reasonable juror would not have interpreted the challenged instruction as coercive such that it would be unconstitutional.

The judge's initial instruction here cautioned the jurors to reconsider their

views. He made no reference to majority or minority views, the essence of the "Allen charge". He also stressed that the aggravating circumstance(s) had to be found beyond a reasonable doubt and that if the jury could not reach a unanimous verdict that a sentence of life imprisonment would be imposed. The judge added the caution that the instructions were not to be construed as an opinion of the court. Besides considering the statutory aggravating circumstances the jury was told to weigh the mitigating factors in considering the sentence. (J.A. 43-47). Taken as a whole the original jury instructions do not violate the Eighth Amendment under the aforementioned standards. Taken as a whole the instructions would not coerce a reasonable juror into reaching a verdict.

The analysis must now focus on the effect on the jury of the charges that were given twice during deliberations. The first was after a total of 8 hours and 43 minutes of deliberations when the jury requested further instruction from the judge because of their "great distress and confusion", not that they were deadlocked. In response, the judge repeated the consequence of the jury's failure to agree unanimously on a sentence, then asked if the jury had arrived at any verdicts. He then polled the jury to see if further deliberations would be beneficial. The 8 to 4 results were not read in the presence of the jury so as to have had a coercive effect on it. This charge merely repeated the law, and the poll was directed to the advisability of further deliberations, not toward the count for life or death.

About twenty minutes later, the jury requested additional instruction based on a misunderstanding of the question previously asked. Thus the jury was again questioned regarding the value of further deliberations at its request. But this time the trial court, after repeating the consequences of the jury's failure to unanimously agree on a verdict, instructed the jurors on reconsidering their views to reach a verdict if it could be done without violence to their individual judgment. He cautioned the jurors against surrendering their honest beliefs because of the views of fellow jurors or for the mere purpose of returning a verdict. Fifty-five minutes later the jury returned three sentences of death.

These two incidents of jury instruction do not violate any

constitutional standards enunciated by this Honorable Court. The so called "Allen charges" did not mention minority or majority views; the charges reminded the jurors of the consequences of a deadlock; they also cautioned against relinquishing an honest view to reach a verdict; they were given at the request of the jurors who never claimed to be deadlocked. (Distress and confusion are not deadlocked.) Those charges to the jury could not be construed as coercive by a reasonable jury. Hence, the charges do not violate constitutional standards of the Eighth Amendment.

B. United States Supreme Court's View on Inquiry of Juror Division

Petitioner argues that the charges combined with the inquiry of the juror

division produced the coercive effect that violated the Eighth Amendment and the fundamental fairness and due process of the penalty phase of the bifurcated trial.

This Honorable Court expressed its views on such inquiry in Brasfield v. United States, 272 U.S. 448, 47 S.Ct. 135 (1926). There, the judge, after several hours of jury deliberation, inquired how it was divided numerically. The foreman informed him that the count was 9 to 3 without indicating which number favored a conviction. Without much discussion this Court condemned the practice:

> "We deem it essential to the fair and impartial conduct of the trial that the inquiry itself should be regarded as ground for reversal. Such procedure serves no useful purpose that cannot be attained by questions not requiring the jury to reveal the nature or extent of its division.

Brasfield v. United States, 47 S.Ct. at 135.

At the first blush this language might indicate a reversal in the instant case. But factually the cases differ in key areas. In Brasfield, the judge inquired regarding the juror count on guilt or innocence. In the case at bar, the judge inquired regarding the count on the benefits of further deliberations. As the Brasfield court stated, such an inquiry regarding the count on guilt or innocence serves no useful purpose. Whereas the inquiry here aided the judge in his decision of when to declare a mistrial. After seven days of trial and deliberations, a declaration of a mistrial was a decision with major consequences. When a majority of the jurors felt further deliberations would be beneficial, a mistrial would not be

warranted. The fact that there were two inquiries was not coercive since it was the jury itself that requested the repetition of the question. The change in the vote on second polling could have been the result of three juror's misunderstanding and not of coercion. When eleven jurors wished to continue deliberations a mistrial would not be appropriate and the trial court properly apprised itself of this situation. Hence, the inquiry in the case at bar was not the same substantive inquiry as in Brasfield, and, contrary to Brasfield, it did serve a useful purpose.

After reviewing the facts under the guidelines of this Honorable Court, it is clear that the jury charges combined with the juror inquiry did not violate the Eighth Amendment nor the fundamental fairness and due process of petitioner's trial.

C. Federal Constitutional Standards on Allen Charges and Juror Inquiry

Nine of the twelve Federal Appellate Circuits have continued to maintain convictions on review where alleged constitutional violations were based on an "Allen charge", or repetition of an "Allen charge". These courts have continued to emphasize the appropriate constitutional inquiry as to whether in its context and under all circumstances the "Allen charge" was coercive. Jenkins v. United States, supra; Williams v. Parke, 741 F.2d 847 (6th Cir. 1984); Potter v. United States, 691 F.2d 1275 (8th Cir. 1982). In the course of developing an analysis, the Courts have established that the "Allen charge" should be incorporated into the body of

the Court's original instructions to the jury. United States v. Blanden, 784 F.2d 1048, 1050 (10th Cir. 1986); Potter v. United States, supra at 1277. Although it has been cautioned that the charge should not be given during deliberation, Circuits have held either no error or harmless error when so given after reviewing the totality of the circumstances. United States v. Rengifo, 789 F.2d 975 (1st Cir. 1986); United States v. Robinson, 560 F.2d 507 (2nd Cir. 1977); United States v. Gordon, 780 F.2d 1165 (5th Cir. 1986); United States v. Rey, 811 F.2d 1453 (11th Cir. 1987); Monroe v. Blackburn, 748 F.2d 958 (5th Cir. 1984); Williams v. Parke, supra.

In the instant case the so called "Allen charge" was included in the original charge to the jury at the end of

the penalty phase. (J.A. 43-47). Although the modified "Allen charge" portion of the original charge was repeated once during deliberations, (J.A. 56), the substance of that charge must be carefully considered to determine whether the language in the context of all the circumstances was coercive in nature. Potter v. United States, 691 at 1271; Jenkins v. United States, 85 S.Ct. at 1060.

First the judge reminded the jurors that a sentence of life imprisonment without benefit of parole, probation or suspension of sentence would be imposed if the jury was unable to agree on a recommendation. Then the judge reminded the jury of their duty to consider each other's views and discuss the evidence "with the objective of reaching a just verdict if you can do so without violence

to that individual judgment." (J.A. 56). This latter sentence is not an order to reach a verdict, or a "dynamite charge", but a reminder to the jury of the goal of deliberations, a verdict. The clause following tempered the objective by reminding the jurors to adhere to their personal judgments if acquiescence would violate their conscience.

Lastly, the judge reminded the jurors to decide the case for themselves after discussion with fellow jurors. He urged them to reconsider their views and change their opinion if "you are convinced you are wrong". The judge ended the colloquy by cautioning the jurors to not surrender their honest belief based on the opinion of fellow jurors or for the purpose of a verdict. Id.

This instruction is innocuous and nothing more than a gentle reminder to

further consider the evidence and attempt to arrive at a verdict. Potter v. United States, supra; see e.g., United States v. Cook, 663 F.2d 809-810 (8th Cir. 1981); United States v. Skillman, 442 F.2d 542 558-59 n. 13 (8th Cir. 1971).

Within the context of the entire penalty phase of the trial, it cannot be viewed as coercive. The jury never announced a deadlock. It merely expressed "great distress and confusion". When polled as to the benefits of further deliberations the jury wished to continue eleven to one. Furthermore, the instruction does not contain any of the reversible errors from prior cases. United States v. Chanya, 700 F.2d 192 (5th Cir. 1983) (reversed the conviction based on an "Allen charge" that reminded jurors of the expense and burden of a retrial, addressed the minority views but

not the majority regarding reconsideration of opinion and inquired into the count of the jurors relative to guilt or innocence); United States v. Jenkins, supra, (conviction reversed on the judge's statement to the jury during deliberation, "You have got to reach a decision in this case.", as coercive in context and under all circumstances); Jones v. Norwell, 472 F.2d 1185 (6th Cir. 1973) (conviction reversed on invasion of jury secrecy by judge's identification of the deadlocked jury's majority count, a coercive jury charge which emphasized the jury's duty to reach a verdict and a caution that they were the only twelve people who could do so, and the speedy return of the verdict subsequent to the charge[4]).

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4 Five minutes. Jones v. Norwell, supra at 1185.

Although the language of the instruction herein is not in itself coercive such that it would infect the fundamental fairness and due process of the trial, it must be viewed in connection with the judge's inquiry into the opinion of the jurors on the benefits of further deliberation. Generally, a judge's inquiry into the extent of the jury's numerical division is reversible error. Brasfield v. United States, supra; United States v. Chanya, supra; Jones v. Norwell, supra. But these cases reflect on inquiry regarding guilt or innocence with the results made known in open court. The instant case is distinguished because the inquiry was not about guilt or innocence, nor life or death, but simply whether or not further deliberations would be beneficial. The jury in both instances was removed from

the courtroom before the results were made known. It cannot be assumed that the minority juror(s) were voting for life. The juror(s) responding "no" could have been discouraged by the discussions although himself voting for death. It is impossible to ascertain from the record what the division represented. In retrospect, it must be remembered that this jury was reflecting on seven days of evidence of the violent deaths of five people. Plus it had to review this evidence to decide whether or not to impose a sentence of life or death for the murder of three victims. The five verdicts which included two verdicts of the lesser included offense of manslaughter indicated that this jury carefully considered the evidence which would support each element of the crime. It is not surprising then that such a

careful jury would again meticulously consider whether a life or death sentence should be imposed for each of the first degree murder convictions. Since the inquiry here differs from the inquiry banned by Brasfield, supra, it is not per se error.

Several Federal Circuits have held that the per se error rule of a judge's inquiry into the numerical breakdown of a deadlocked jury does not apply on review of state court instructions, see William v. Parke, supra; Locks v. Sumner, 703 F.2d 403, 405-07 (9th Cir. 1983) (citing United States ex rel. Kirk v. Director of Corrections, 678 F.2d 723 (7th Cir. 1982); Cornell v. State of Iowa, 628 F.2d 1044 (8th Cir. 1980), cert. denied, 449 U.S. 1126, 101 S.Ct. 944, 67 L.Ed.2d 112 (1981); Ellis v. Reed, 596 F.2d 1195 (4th Cir. 1979), cert. denied, 444 U.S. 973,

100 S.Ct. 468, 62 L.Ed.2d 388 (1979)). The inquiry made here is unlike the ones made in the aforementioned cases since it asked whether or not further deliberations would be beneficial. Under the totality of the circumstances this inquiry combined with the supplemental charge was innocuous and did not infect the fundamental fairness and due process of the trial such that the constitutional rights of petitioner were violated. In fact, the record reflects that the trial court was cautious to preserve the rights of petitioner to a fair and impartial jury trial. Thus, he consulted the prosecutor and defense attorney regarding the method for handling juror questions during deliberation and these procedures, complained about on collateral review, were stipulated to by defense counsel. (J.A. 52).

D. Louisiana Law

Finally, petitioner continually emphasizes the length of jury deliberations and their expression of distress. Eight hours deliberation after seven days of trial to decide a life or death sentence is not excessive deliberation. Moreover, under Louisiana law, the trial judge is the one who determines when a jury is hung for purposes of the applicable statute, La. Code Crim. Proc. Ann. Art. 905.8 (West 1984). The petitioner must show an abuse of discretion by the trial judge to warrant reversal. As in the instant case there is no abuse of discretion, nor did the Louisiana Supreme Court find an abuse of discretion. State v. Lowenfield, 495 So.2d 1215 (La. 1985). In its opinion the Louisiana Supreme Court addressed three issues:

1) Whether the trial judge should have declared a mistrial when the jury had difficulty in reaching a decision;

2) Whether the judge coerced the jury into returning a verdict by recharging them as to the effect of a hung jury and sending them back in to deliberate;

3) Whether the jury was allowed to deliberate too long.

On each issue the Court found that there was no abuse of discretion on the part of the judge emphasizing that the recharging was at their request.

E. There Was No Violation Of The Sixth And Fourteenth Amendments

The issues herein deal with whether or not the petitioner's Sixth Amendment

right to a fair and impartial jury and his Fourteenth Amendment right to Due Process were violated. Under the Sixth Amendment, petitioner has no right to a trial by jury in the penalty phase of his bifurcated trial. Spaziano v. Florida, 468 U.S. 447, 104 S.Ct. 3154, 82 L.Ed.2d 340 (1984). Although it is permissible that a capital scheme allow a judge to impose the penalty, Louisiana has given that responsibility to the jury. La.Code Crim. Proc. Ann. art. 905.1. Thus any jury coercion by instruction or polling in the conduct of the trial would be a matter of state procedural law.

The Louisiana Supreme Court reviewed both phases of petitioner's trial and found no error in the instructions and polling. State v. Lowenfield, 495 So.2d at 1259. In the course of deciding that petitioner was not deprived of his right

to a fair and impartial jury under state law, the Louisiana Supreme Court stated that it was "not error for the court to impress upon them the importance of the case, urge them to come to agreement, and send them back for further deliberations." Ibid.

But under certain circumstances, the Due Process Clause will protect those rights given to a person by the state. In Hicks v. Oklahoma, 447 U.S. 343, 100 S.Ct. 2227, 65 L.Ed.2d 175 (1980) this Court held that where state law creates for the defendant a liberty interest in having the jury make particular findings, the Due Process Clause implies that appellate findings do not suffice to protect that entitlement. Hence the jury instruction and/or inquiry must be reviewed within the purview of the Due Process Clause.

A review of the transcript of the hearing reveals that the judge's instruction and inquiry did not remove from the jury its burden to arrive at a verdict, or not arrive at a verdict. The judge instructed the jurors in each instance that he would impose life if they were unable to reach a unanimous verdict. Further instructions were at the jury's request. At no time did the judge take any responsibility from it.

Moreover, the judge's inquiry was not intrusive to the jury's count on life/death, nor was the count made before the jurors such as to embarrass or coerce them.

These actions of the trial judge satisfied the "twin objective" of "measured, consistent application and fairness to the accused." Eddings v. Oklahoma, 455 U.S. 104, 110-11, 102 S.Ct.

869, L.Ed.2d 1 (1982); Spaziano v. Florida, 468 U.S. at 459-460. Under Due Process, the death penalty must be administered in a way that rationally distinguishes from the many criminal defendants those for whom death is an appropriate penalty. Zant v. Stephens, 462 U.S. 862, 873-880. At the same time, the sentencing scheme must be based on facts and circumstances of the individual and the crime. Lockett v. Ohio, 438 U.S. 586, 601-605. Petitioner's sentencing hearing preserved these two objectives and his rights under Due Process. Moreover, as previously discussed in this argument, the substance of the instruction and the polling were not per se error.

Conclusion

After a review of the facts as reflected in the record herein and

considering the applicable law it is clear that the jury charges and polling did not violate the constitutional standards mandated by the Sixth, Eighth, and Fourteenth Amendments.

ARGUMENT II

Petitioner's Death Sentence, Based On A Sole Statutory "Aggravating" Circumstance That Merely Repeats An Element Of The Crime, Does Not Violate The Eighth Amendment Requirement That Sentencer Discretion Be Directed And Limited So As To Minimize The Risk Of Arbitrary And Capricious Executions.

Petitioner claims that since the single aggravating circumstance relied upon at the penalty phase fails to narrow the class of death eligible persons, Louisiana's Capital Scheme suffers from the same infirmity as the discretionary sentencing statutes invalidated by this Court in Furman v. Georgia, 408 U.S. 238 (1972).

Additionally, petitioner argues that the capital sentencing procedure failed to provide a rational basis for the jury to distinguish those cases where the death penalty is imposed from those where it is not for the same offense. Finally, petitioner proposes that Louisiana's capital sentencing scheme avoids an individualized deliberative process as mandated by prior decisions of this Court.

A. Louisiana's Statutory Capital Scheme

In 1982, Louisiana's Criminal Code, La. Rev. Stat. Ann. §14, (West 1982), included four grades of homicide: First Degree Murder, Second Degree Murder, Manslaughter and Negligent Homicide.[5]

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5 The Louisiana statutes are delineated in full in the appendix to this brief.

Second Degree Murder is the statute which represents the so called "intentional" murder or a non-intentional murder committed in the course of certain enumerated crimes. A majority of murders fall within this classification and the sentence for intentional killing is life imprisonment at hard labor without benefit of parole, probation or suspension of sentence. But Louisiana has chosen to narrow the class of homicides eligible for the death penalty at the definitional stage with the First Degree Murder Statute. In 1982, there were four categories[6] which limited those eligible for a conviction of First Degree Murder and thereby eligible for the death penalty.

After a conviction of First Degree Murder, a defendant is exposed to a

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6 See La.R.S. 14:30 in the Appendix.

sentence of life imprisonment without benefit of parole, probation or suspension of sentence or death. Thereafter a sentencing hearing is held according to the guidelines established by La. Code Crim. Proc. Ann. art. 905 et seq.[7] These articles direct that the hearing focus on the circumstances of the offense and the character and propensities of the offender. The jury may also consider any evidence offered at the trial on the issue of guilt. The jury must find beyond a reasonable doubt that at least one statutory circumstance exists from the list enumerated in La. Code Crim. Proc. Ann. art. 905.4 in order to recommend death. It does so after considering any mitigating circumstances, a list of which is found in La. Code Crim. Proc. art. 905.5.

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7 See Appendix to petitioner's brief.

Mitigating evidence submitted at the hearing is not limited to those enumerated in the Article. In Louisiana, the jury is not required to weigh the mitigating circumstances against the aggravating circumstances but only to "consider" them.

A death sentence can only be imposed upon the unanimous recommendation of the jury. Life imprisonment can also be imposed by the unanimous recommendation but if the jury cannot agree upon a sentence then the court shall sentence defendant to life imprisonment without benefit of parole, probation or suspension of sentence, La. Code Crim. Proc. art. 905.8.

If the jury returns a sentence of death that sentence is automatically reviewable for excessiveness by the Supreme Court of Louisiana. Id., 905.9.

Louisiana's statutes provide all safeguards mandated by the Eighth and Fourteenth Amendments of the United States Constitution to ensure that the death penalty is not imposed in an arbitrary and capricious manner.

B. Constitutional Guidelines For Capital Sentencing Schemes Delineated by The United States Supreme Court Since Furman v. Georgia.

This Court stated in Furman v. Georgia, 408 U.S. 238 (1972), that because of the uniqueness of the death penalty, it could not be imposed under sentencing procedures that created a substantial risk that it would be inflicted in an arbitrary and capricious manner. In response to the dictates of Furman the states enacted statutory schemes which redefined crimes for which

the death penalty was available and sentencing schemes to govern the decision of whether or not to impose death. This Court's opinions since Furman dealing with the constitutionality of various state death penalty schemes have established guidance for the inquiry herein.

In Jurek v. Texas, 96 S.Ct. 2950 (1976), this Court approved Texas's capital sentencing scheme whereby the statutory aggravating circumstances are contained within the definition of the crime. Thus when murder occurs in one of the five circumstances[8] detailed in the

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8 Five situations: murder of a peace officer or fireman; murder committed in the course of kidnapping, burglary, robbery, forcible rape, or arson; for remuneration; murder committed while escaping or attempting to escape from a penal institution; and murder committed by a prison inmate when the victim is a prison employee. See Tex. Penal Code §19.03 (1974).

statute and a conviction is had, the death penalty must be imposed if the jury makes the enumerated additional findings against defendant. The Texas statute differs from those in other states by placing the aggravating circumstances at the definitional stage of the crime thereby narrowing those alleged murders even eligible for the death penalty. Whereas some states have chosen to maintain the traditional specific intent homicide statute and use the aggravating circumstances at the penalty phase to narrow the class of convicted murderers eligible for death, Texas and Louisiana have chosen otherwise.

In Louisiana any specific intent homicide, or non intentional homicide committed in the course of the enumerated crimes, which does not include an aggravating circumstance enumerated in

the First Degree Murder Statute, qualifies as a Second Degree Murder, La. Rev. Stat. Ann. §14:30.1, a conviction for which only life imprisonment without benefit of parole, probation or suspension of sentence is available. As in Texas, the death penalty in Louisiana is an available sentencing option--even potentially--for a smaller class of murders than in other states. Jurek, 96 S.Ct. 2956.

After a conviction for a capital murder both Texas and Louisiana provide a sentencing hearing. At the sentencing hearing in Texas three questions are asked which must be answered "yes" beyond a reasonable doubt to impose a death sentence. If the jury answers "no" to any question then life imprisonment results. Jurek, 96 S.Ct. 2955.

Of concern to this Court in Jurek, supra, was that the capital sentencing system, in order to meet the requirements of the Eighth and Fourteenth Amendments, must allow the sentencing authority to consider mitigating circumstances. Jurek, 96 S.Ct. at 2956. Texas's capital sentencing scheme was held constitutional since this Court found the defendant in Texas was allowed to introduce any relevant evidence in mitigation in response to the second statutory question. Thus providing the sentencing authority a basis to consider not only why a death sentence should be imposed but also why it should not be imposed.

Likewise, Louisiana's sentencing hearing, although not structured by specific questions as in Texas, allows the introduction of relevant evidence on mitigating circumstances. In fact, the

judge reads and gives a list[9] of mitigating circumstances to the jury for consideration. There is no mandate in Louisiana's scheme that the jury must weigh the mitigating against the aggravating circumstances. But death can only be imposed after jury consideration of both and based on at least one aggravating circumstance found beyond a reasonable doubt. Whether or not the aggravating circumstance found at the penalty phase repeats one element of the crime in the guilt phase does not violate the Eighth and Fourteenth amendments under Jurek since the sentencing jury is allowed to consider relevant evidence in mitigation.

Furthermore, Louisiana's capital sentencing scheme is basically similar to

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9 La. Code Crim. Proc. Art. 905.5.

Texas' because the aggravating circumstances are found at the definitional stage. The sentencing phase of each provides both the State and the defendant an opportunity to further focus on the particularized circumstances of the individual offense and the individual offender before it can impose a sentence of death. Gregg v. Georgia, 428 U.S. 153, 191, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976

On the same day that Jurek, supra, was decided this Court issued Woodson v. North Carolina, 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976), in which it declared North Carolina's first degree murder statute, which mandated the death penalty upon conviction, unconstitutional. There were three basis for the decision that the Eighth and Fourteenth Amendments were violated:

1. The common law practice of imposing a death sentence upon every person convicted of a specified offense. Woodson v. North Carolina, 428 U.S. at 300.

2. Withdrew all sentencing discretion from jury. Id., at 301.

3. Failed to allow particularized consideration of relevant aspects of the character and record of a convicted defendant before imposing a sentence of death. Id., at 302.

Not only does Louisiana not have a mandatory death penalty but also its capital scheme does not violate the second and third criteria aforementioned.

A third capital case, decided the same day, was Gregg v. Georgia, 428 U.S. 153, at 191, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976). In Gregg, supra, this Court established several criteria for a capital scheme that would be within the purview of the Eighth and Fourteenth Amendments.

Gregg, repeated Furman's mandate that where discretion is afforded a sentencing body on whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action. Gregg further states that a bifurcated system, that allows a jury to have information prejudicial to the question of guilt but relevant to the question of penalty in order to impose a rational sentence, is more likely to insure elimination of arbitrary and capricious imposition of sentence. Louisiana has a bifurcated capital system. At the sentencing phase evidence not admissible at the guilt phase is admissible but limits are placed on the aggravating evidence within the guidelines of La. Code Crim. Proc. Ann. art. 905.4. The

defendant is given a broad range of admissible evidence by La. Code Crim. Proc. Ann. art. 905.5 (h): "Any other relevant mitigating circumstances."

Gregg, 428 U.S. at 189, also repeated the mandate in Woodson, 428 U.S. at 304, that the death sentencing scheme should focus on the character and record of the individual offender and the circumstances of the particular crime. Louisiana's sentencing scheme satisfies this constitutional criteria as well as Gregg's mandate that "the discretion to be exercised is controlled by clear and objective standards so as to produce non discriminatory application". Gregg, 96 S.Ct. at 2936.

Louisiana provides for a check on the non discriminatory application of the death penalty by mandating direct, automatic review of all death sentences

by the Supreme Court of Louisiana. La. Code Crim. Proc. Ann. art. 905.9. Gregg, 96 S.Ct. at 2937. According to the Rules of the Louisiana Supreme Court, it conducts a proportionality review of every death sentence to determine whether or not the sentence is disproportionate to the penalty imposed, considering both the offense and the offender. First that Court reviews defendant's personal history including his family background, criminal history, educational background and any psychological evaluations. Then the Court reviews the offense itself, after which it compares the imposition of the death penalty with similar cases where the death penalty was imposed. It reviews these phases to determine whether or not the sentence was imposed as a result of passion, prejudice or other arbitrary factors, the evidence supports

the jury's findings of the aggravating circumstance(s) and the sentence is disproportionate to the penalty imposed in similar cases, considering the crime and the defendant. See: State v. Lowenfield, 495 So.2d 1245, 1260-61 (La. 1985).

This Honorable Court further held, in Godfrey v. Georgia, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980), that a death sentence based on the ground that the offenses were "outrageously or wantonly vile, horrible or inhuman", violated the Eighth and Fourteenth Amendments since the Georgia Supreme Court adopted such a broad and vague construction of the death sentence statute. In so holding, this Court repeated that a state must tailor and apply its law in a manner that avoids the arbitrary and capricious infliction of

the death penalty. Part of the State's responsibility in this regard is to define the crimes for which death may be the sentence in a way that obviates "standardless discretion", Godfrey, 100 S.Ct. at 1764.

> "It must channel the sentencer's discretion by 'clear and objective standards' that provide 'specific and detailed guidance', and that 'make rationally reviewable' the process for imposing a sentence of death."

Id. at 1765.

Louisiana's capital scheme sets standards through aggravating circumstances. Despite the fact that some of the aggravating circumstances in the penalty phase repeat elements of the underlying crime those aggravating circumstances represent the minimum standard, if found beyond a reasonable doubt, to impose the death penalty. But this minimum standard

is considered with the factors as listed in La. Code Crim. Proc. Ann. art. 905.5, in the decision whether or not to impose death. Hence Louisiana's sentencing hearing offers to the jurors clear and objective standards for discretion as required in Godfrey, supra.

The opinion in Zant v. Stephens, 462 U.S. 862, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983), while determining that a death sentence was not constitutionally impaired by invalidating one of several statutory aggravating circumstances, concluded that the Georgia scheme where the aggravating circumstance merely performs the function of narrowing the category of persons convicted of murder who are eligible for the death penalty did not violate the Constitution. The Georgia scheme provides for categorically narrowing at the definitional stage, and

for individualized determination and appellate review at the selection stage and this structure is constitutional. Zant, 462 U.S. at 879.

Lowenfield's capital conviction was based on a single aggravating circumstance which was found at the definitional stage. Thereafter, he was sentenced to death based on the same sole aggravating circumstance which was identified in writing but only after reconsidering the evidence from trial and any mitigating circumstances. Although some discretion was still afforded to the jury, this Court has found that the sentencing scheme must still include discretion as long as it is "suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action". Zant v. Stephens, Id., at 874; Barclay v. Florida, 463 U.S.

951, 103 S.Ct. 3418, 77 L.Ed.2d 1134 (1983).

Besides a list of possible mitigating circumstances to review plus any evidence offered by Lowenfield and a list of the statutory aggravating circumstances, the sentencing jury had the instructions from the judge that if it could not reach a unanimous verdict he would impose life imprisonment without benefit of parole, probation or suspension of sentence. These clear and objective standards at the sentencing hearing are sufficient to protect the defendant from an arbitrary and capricious imposition of the death sentence. Moreover, the imposition of the death sentence was reviewed by the Louisiana Supreme Court for any violation of the constitutional standards of the Eighth Amendment.

The Louisiana capital scheme satisfies the limitations imposed by the Court in its opinions since Furman. The fact that the defendant was sentenced to death based on a single aggravating circumstance that repeats the element of the underlying crime is a peculiar feature of this case. The peculiarity of this crime is that defendant killed five members of a family, three generations, including a four year old child. A death sentence is not disproportionate to this crime despite the fact that only one aggravating circumstance was found beyond a reasonable doubt.

C. STANDARD OF REVIEW

This Court presumes the validity of a punishment selected by a democratically elected legislature against the constitutional measure. The

constitutional test is intertwined with an assessment of contemporary standards and the legislative judgment is weighed heavily. See Gregg v. Georgia, 96 S.Ct., at 2926. The Court in Gregg, ibid, further stated:

> "The deference we owe to the decisions of the state legislatures under our federal system, 408 U.S., at 465-470, 92 S.Ct., at 2842-2844 (Rehnquist, J., dissenting), is enhanced where the specification of punishments is concerned, for 'these are peculiar questions of legislative policy". Gore v. United States, 357 U.S. 386, 393, 78 S.Ct. 1280, 1285, 2 L.Ed.2d 1405 (1958). Cf. Robinson v. California, 370 U.S., at 664-665, 82 S.Ct., at 1419-1420; Trop v. Dulles, 356 U.S., at 103, 78 S.Ct., at 599 (plurality opinion); In re Kemmler, 136 U.S, at 447, 10 S.Ct., at 933.

Since Louisiana's capital scheme does not offend any of the constitutional standards established by this Court and the substantive elements at issue herein

do not violate the Eighth or Fourteenth Amendments, this Court should affirm petitioner's death sentence as decided by the jury.

D. Federal Appellate Courts

The Eighth Circuit's decision in Collins v. Lockhart, 754 F.2d 258 (1985) is seemly contrary to respondent's position herein. But the Eighth Circuit's rationale is premised on a standard that is not mandated by this Court's constitutional analysis. In Collins, supra, the convicted robber-murderer was sentenced to death based on three aggravating circumstances one of which was for "pecuniary gain". The Court held that since pecuniary gain merely duplicated an element of robbery it cannot be used to perform the narrowing function for sentencing. It

based its conclusion on the following interpretation:

> "An aggravating circumstance is an objective criterion that can be used to distinguish a particular defendant on whom the jury has decided to impose the death sentence from other defendants who have committed the same underlying capital crime."

Collins, 754 F.2d at 264.

The aggravating circumstance provides the narrowing function that distinguishes a death eligible defendant from those who commit similar crimes. If murder is the underlying crime then all murderers who intentionally kill during a robbery would be eligible for the death penalty. What then distinguishes those who are death eligible from those who actually receive a death sentence are the mitigating and aggravating circumstances considered at the sentence hearing. Once the narrowing of death eligible criminals

is performed by statute then the clear and objective standards to guide the discretion of the sentences become effective.

Moreover, the Eighth Circuit proposes that had Arkansas defined any deliberate, premeditated murder as capital felony murder, and then prescribed the commission of that murder for pecuniary gain as one of the statutory aggravating circumstances, no one could claim that double counting had occurred. Collins, at 265. What the Eighth Circuit has done is reject the narrowing of death eligible crimes at the definitional stage which has been held by this Court to be constitutional. See Jurek v. Texas, supra.

The Fifth Circuit in Welcome v. Blackburn, 793 F.2d 672 (5th Cir. 1986), noted that the Louisiana Supreme Court

has held that a jury is not compelled to find an aggravating circumstance was present merely because it found the accused guilty of murder, State v. Knighton, 436 So.2d 1141 (1983). Louisiana does not enforce the sort of mandatory death penalty condemned in Woodson v. North Carolina, supra.

The Fifth Circuit in Welcome v. Blackburn, at 677, summed up the argument:

> "Welcome's charge that because Louisiana statutory scheme duplicates an aggravating circumstance in the underlying crime, it unconstitutionally fails to narrow the class of persons qualifying for the death sentence is sophistical. By classifying first degree murder as including certain aggravating circumstances the state has narrowed the class of those subject to the death penalty as effectively as if it allowed a broader class to be convicted but then limited those within the broader class who could be sentenced to death

> to only persons whose crimes are accompanied by specific aggravating circumstances."

Conclusion

Louisiana's capital scheme where the imposition of the death penalty can be based on a single aggravating circumstance which merely repeats the element of the crime does not violate the limitations imposed by the Eighth and Fourteenth Amendments.

CONCLUSION

Since petitioner's sentencing hearing was not coercive and unfair and the death sentence, based on a sole aggravating circumstance which repeated an element of the underlying crime, did not violate the Eighth and Fourteenth Amendments, this Court should affirm the imposition of the sentence of death.

Respectfully Submitted,

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STATUTORY APPENDIX

Louisiana Code of Criminal Procedures Annotated
(West 1984 & Supp. 1986)

CHAPTER 1. OFFENSES AGAINST THE PERSON

Art.

30 First Degree Murder
30.1 Second Degree Murder
31 Manslaughter
32 Negligent Homicide

Art. 30. First Degree Murder

A. First degree murder is the killing of a human being:

(1) When the offender has specific intent to kill or to inflict great bodily harm and is engaged in the perpetration or attempted perpetration of aggravated kidnapping, aggravated escape, aggravated arson, aggravated rape, aggravated burglary, armed robbery, or simple robbery;

(2) When the offender has a specific intent to kill or to inflict great bodily harm upon a fireman or peace officer engaged in the performance of his lawful duties;

(3) When the offender has a specific intent to kill or to inflict great bodily harm upon more than one person; or

(4) When the offender has specific intent to kill or inflict great bodily harm and has offered, has been offered, has given, or has received anything of value for the killing.

(5) When the offender has the specific intent to kill or to inflict great bodily harm upon a victim under the age of twelve years. Pursuant to Acts 1985.

B. For the purposes of Paragraph (A)(2) herein, the term peace officer is defined to include any constable, marshal, deputy marshal, sheriff, deputy sheriff, local or state policeman, game warden, federal law enforcement officer, jail or prison guard, parole officer, probation officer, judge, attorney general, assistant attorney general, attorney general's investigator, district attorney, assistant district attorney, or district attorney's investigator.

C. Whoever commits the crime of first degree murder shall be punished by death or life imprisonment at hard labor without benefit of parole, probation, or suspension of sentence in accordance with the recommendation of the jury.

Amended by Acts 1973, No. 109 §1; Act. 1975, No. 327, §1; Acts 1976, No. 657, §1; Acts 1979, No. 74, §1, eff. June 9, 1979; Acts 1985, NO. 515, §1. Amendment attached.

Art. 30.1 Second Degree Murder

Second degree murder is the killing of a human being:

(1) When the offender has a specific intent to kill or to inflict great bodily harm; or

(2) When the offender is engaged in the perpetration or attempted perpetration of aggravated rape, aggravated arson, aggravated burglary, aggravated kidnapping, aggravated escape, armed robbery, or simple robbery, even though he has no intent to kill or to inflict great bodily harm.

Whoever commits the crime of second degree murder shall be punished by life imprisonment at hard

labor without benefit of parole, probation, or suspension of sentence.

Added by Acts 1973, No. 111, §1. Amended by Acts 1975, No. 380, § 1; Acts 1976, No. 657, §2; Acts 1977, No. 121, §1; Acts 1978, No. 796, §1; Acts 1979, No. 74, §1, eff. June 29, 1979.

Art. 31. Manslaughter

Manslaughter is:

(1). A homicide which would be murder under either Article 30 (first degree murder) or Article 30.1 (second degree murder), but the offense is committed in sudden passion or heat of blood immediately caused by provocation sufficient to deprive an average person of his self control and cool reflection. Provocation shall not reduce a homicide to manslaughter if the jury finds that the offender's blood had actually cooled, or than an average person's blood would have cooled, at the time the offense was committed; or

(2) A homicide committed, without any intent to cause death or great bodily harm.

(a) When the offender is engaged in the perpetration or attempted perpetration of any felony not enumerated in Articles 30 or 30.1, or of any intentional misdemeanor directly affecting the person; or

(b) When the offender is resisting lawful arrest by means, or in a manner, not inherently dangerous, and the circumstances are such that the killing would not be murder under Articles 30 or 30.1.

Whoever commits manslaughter shall be imprisoned at hard labor for not more than twenty-one years.

Amended by Acts 1973, No. 127, § 1.

Art. 32. Negligent homicide

Negligent homicide is the killing of a human being by criminal negligence.

The violation of a statute or ordinance shall be considered only as presumptive evidence of such negligence.

Whoever commits the crime of negligent homicide shall be imprisoned with or without hard labor for not more than five years, fined not more than five thousand dollars, or both.

Amended by Acts 1980, No. 708, §1.